CONTENTS

1 **THE AMYGDALA DIARIES**
David Kellem, Esq.

5 **ON THE QUESTION OF A PARTY'S CAPACITY TO USE MEDIATION** Jeanne Cleary

9 **OVERCOMING RELUCTANCE TO ENGAGE IN MEDIATION**
Laura Athens, Esq.

12 **PEACEMAKING PRACTICE**
Rackham Karlsson, Esq.

15 **THE FUTURE OF MEDIATION**
John Ford

19 **THE OBSERVER EFFECT IN FAMILY CONFLICT**
Justin Kelsey, Esq.

21 **BEYOND EMAIL: THE WISP**
Dave Mitchell, Esq.

25 **HOW CAN YOU SAY THAT?**
Kate Fanger

26 **WHAT'S NEWS? NATIONAL & INTERNATIONAL FAMILY NEWS CHRONOLOGICALLY COMPILED & EDITED** By Les Wallerstein

33 MCFM News
36 Announcements
38 Join Us
39 Directorate

40 Editor's Notice

COPYRIGHT NOTICE

MCFM GRANTS PERMISSION TO REPRODUCE AND DISSEMINATE ARTICLES & GRAPHICS PROVIDED THAT MCFM AND THE AUTHORS ARE CREDITED, EACH AUTHOR CONSENTS AND DISTRIBUTION IS NOT-FOR-PROFIT.

MCFM © 2015

THE AMYGDALA DIARIES

By David Kellem

Based on a presentation by Dr. Ranna Parekh and David Hoffman, ESQ.

Mediators are challenged to guide clients through a lot of obstacles along the way to settlement. One physically small but strong and stealthy obstacle is the human amygdala. Amygdalae are almond-shaped organs in the left and right hemispheres of our brains that can subconsciously derail rational negotiation.

"The amygdala, it turns out, is the root of some of our less-rational and more problematic behaviors."

The functioning of the human brain has been very much on the mind of the mediation community of late. At the 2014 APFM annual conference last October Bill Eddy presented a program in which he (conceptually) dissected the brains of people he dubs High Conflict Personalities – people who react angrily to every question, comment, or suggestion in a mediation process, no matter how seemingly innocuous. The following month the keynote address of the MCFM Institute was entitled "Brain Matters: Ways Neuroscience Informs Mediation." In their address Dr. Robert Doyle and Dr. Ranna Parekh explained how a well-functioning pre-frontal cortex moderates the more emotional impulses of other brain centers. And this past May, MCFM presented a workshop by Dr. Parekh and David Hoffman that taught participants the brain science underlying prejudice and how mediators can confront inherent biases in themselves and their clients.

The amygdala, it turns out, is the root of some of our less-rational and more problematic behaviors. It has been identified as a primary organ of the paleomammalian mind - the mind of early human beings who spent their days mostly just trying to survive in a hostile world full of beasts of prey and other physical threats. The amygdala is an alarm system and an army all in one. If it senses danger it activates a powerful internal alert. Adrenaline and other hormones surge, muscular systems engage, and the body jumps into self-protective action: stand and fight the danger, or turn fast and flee from it.

Time and evolution eventually relegated the amygdala to a lower station in maintaining human life. Human beings came to live not as much by their ability to fight or to flee but by their wiles – intellect, creativity, planning, building, farming, forming communities, creating laws. These became the pathways to survival and success in an increasingly complex socially based world.

The physical structure of the brain reflected these changes. The cerebral cortex developed and the logical, intellectual centers of the brain expanded. The right and the left hemispheres emerged. Complex neural wiring was laid. Near the base of each

hemisphere the amygdala carried on – but now it had to work in conjunction with the powers of logic, creativity, conscious thought, and communication. Although moment-to-moment survival depended less on the fight or flight response, the amygdala continued to stand guard in the brain – alert and ready for action whenever called to duty.

"Even in people who believe they are not prejudiced, the sub-surface, instinctive workings of the amygdala may make one walk on the other side of the street, sneer, tense up, act dismissively or inconsiderately, present negative facial expressions, or express anger."

So what does the amygdala mean to mediation in modern times?

Clients with high conflict personalities are ready to fight (usually with words) or storm out of the mediation room at the slightest provocation. Awash in angry reactions, they sense threat and danger in every comment and facial expression no matter how innocuous. Neuroscience has shown that these behaviors may be the output of an over-developed amygdala or a damaged or underdeveloped pre-frontal cortex. The neurological wiring that interconnects the emotional and logical centers of the brain may be short-circuited or developmentally inadequate. The danger alarm of the amygdala is easily triggered and its police force is regularly suited in full riot gear.

In their recent MCFM workshop, David Hoffman and Ranna Parekh explained how the amygdala may also be the neurological seat of human prejudice. Prejudice can be characterized as a hostile, often subconscious response to something that is by its nature not inherently dangerous or threatening.

A prejudiced person may on a subconscious and instinctive level react negatively to people of certain races, ethnicities, genders, sexual orientations, ages, personality types, or physiques. For reasons based on subconscious lessons learned even from birth, the amygdala signals threat when faced with someone different. Even in people who believe they are not prejudiced, the sub-surface, instinctive workings of the amygdala may make one walk on the other side of the street, sneer, tense up, act dismissively or inconsiderately, present negative facial expressions, or express anger.

As explained by Hoffman and Parekh, Nobel prize winner Daniel Kahneman and other researchers have identified two types of thinking systems. System 1 may be thought of as rooted in the amygdala and the emotional centers of the brain. It is fast, subconscious thinking based on instinctive reactions, emotional responses, or intuitive judgments. The fight or flight response stimulated by the amgydala is an example of System 1 thinking.

Continued on next page

Instinctive prejudices as well are a form of System 1 thinking.

System 2 thinking is the slow, very deliberate process of logic and conscious thought. It requires mental energy, time, and emotional restraint. People engage System 2 thinking in solving math problems, writing articles, teaching, analyzing passages of poetry, and engaging in thoughtful communication. It is the system we use to confront a serious threat with negotiation rather than attack. It is the type of thinking we employ when we work consciously to overcome prejudices.

System 2 thinking is the brain process we strive to engage in mediation. We want clients to think through their issues and come to interest-based, reasonable decisions. We want ourselves as mediators to remain neutral at all times. Mediators must utilize System 2 thinking constantly to be aware of, monitor, and moderate our emotional responses and prejudices.

System 2 thinking, powered by the prefrontal cortex, can overcome even the most challenging calls of the amygdala to System 1 thinking. However, it takes time and practice, self-awareness, and a full box of mediation tools to learn to work through System 1 obstacles.

For high conflict personalities, the toughest of the tough cases, Bill Eddy has devised a highly structured mediation system. You can read about it in his books such as “So What’s Your Proposal?” To my thinking, Eddy has beautifully masked a System 2 approach in a System 1 facade.

For the more typical clients, there are many ways for mediators to bring the prefrontal cortex to the fore. When tensions mount and tempers flare, or when prejudices erupt, it helps to recognize that the amygdala is firing on all cylinders. Use techniques that, as Hoffman expresses, bring peace into the room. Peace and calm allow time for System 2 thinking to take charge. Develop techniques that that dull the screaming signals of the amygdala and allow the calm rationality of the prefrontal cortex to rise forth.

Some techniques I have learned in my own practice and from discussions at MCFM workshops include:

- Give the clients a writing assignment. David Hoffman helps settlement-resistant people shift to System 2 thinking by having them write down the advantages and disadvantages of settlement.

- Call a time-out. A break in the action of a mediation of 10-20 minutes can dampen the effects of an activated amygdala;

- Call for a caucus. This can have the soothing properties of a time-out but also provide further comfort to an engaged client by giving a listening ear to their feelings or concerns;

- If the clients are inclined to respond positively to the suggestion, engage in some deep breathing exercises.

Deep breaths produce physiological changes that are calming and allow the logical mind to regain dominance;

- Get water for everyone and drink it together. Like breathing deeply, sipping water can be very restorative;

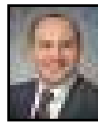
- Early in the mediation take time to find out some activities or experiences that the clients find to be joyful or calming. Then when tensions mount and system 1 behaviors dominate, find a way to divert from the issue at hand and bring these activities into the conversation. It might be a passage of music or song, a fly-fishing experience, a hiking trip in the mountains, a bike ride – anything that brings the clients' minds to a calmer and more rational place;

- Call in the dogs. A well-known husband and wife mediator team literally sends their tail-wagging, people-loving pets into the mediation room when tensions are building and impasse may be nigh.

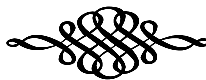
- Interrupt the active negotiations to talk for a time about the process. Reassure the clients that mediation is about fairness, neutrality, and each client being fully heard. Talk about how you can better facilitate those goals if anyone feels that this is not happening. Talk to the clients and give an ear to their struggles in the process. This creates a time bridge to calm the amygdala and also addresses any system 1 behaviors in which you as the mediator may be engaging in the heat of the moment.

- Float above the room and watch yourself. As mediator you must be in the moment at all times and simultaneously above the fray. So take a mental step back from the table, or hover above it, and examine your own behaviors. If you see the effects of any of your own prejudices seeping out (facial expressions, heightening emotions, leaning toward or away from one of the clients, the tone of your voice), rebalance them quickly.

- Mind the mind.



David Kellem is a Family Law Mediator and Attorney with a practice based in Hingham, MA. He is frequently called upon to mediate disputes between his amygdala and pre-frontal cortex. He can be reached at dkellem@kellemlawgroup.com.



ON THE QUESTION OF A PARTY'S CAPACITY TO USE MEDIATION

Jeanne Cleary

A mediator came to me for a consult with the following situation while co-mediating a Harassment Prevention case in a local court.

Case as described by one of the co-mediators: "…[we] were mediating a case between two tenants, and one client informed us that she was being treated for mental illness. She was fairly well composed, and was able to take turns in conversation, staying on point, however, her sense of reality seemed questionable fairly early on (I wondered if I saw her hearing voices?). Also fairly early on, this same party offered a solution that was quite appealing to the other party: "I'll just move out!" We worked in that direction until it was beyond clear that she couldn't string together a commitment to match her statement. We decided that she was not at capacity, if you will, and ended the mediation."

"Under what circumstances might a mediator question whether a party is capable of participating in a mediation? How do we determine a party's capacity to utilize mediation?"

In their debrief, the co-mediators determined that in fact they had very different perspectives about whether they needed to end this mediation based on concerns for this party's mental health, and they were stumped as to how to even begin to talk about it all.

Challenge (the questions these mediators posed):

A. Under what circumstances might a mediator question whether a party is capable of participating in a mediation? How do we determine a party's capacity to utilize mediation?

B. If necessary, how do we exit? What would we say to the parties (and to the court if in a court setting)?

NOTE: This is a big topic. My intention here is to offer a place to begin, an invitation to further conversations, to stimulate and clarify our thinking, and deepen our practice.

For me, any mediation related topic begins and ends with dignity and self-determination of the parties. I say this not to suggest oversimplification or constriction, but to confess upfront my north star on such issues. As a therapist trained mediator, it is particularly important to me to highlight dignity and party self-determination. I'm keenly watchful for the slippage that can occur when therapist mediators start down the road of assessment and diagnosis in the mediation context as this road is fraught (more on that in another piece!) The reality in practice of course requires us to tolerate and

dance with some real complexities here: ideals of practice vs. practicalities of helping folks concretely. We are constantly faced with delicate nuances as well as substantial unknowns while moment to moment redefining what neutrality/impartiality (multi-partiality!), confidentiality, voluntary and self-determination actually mean in practice.

"Fundamentally, mediators will want to be sure a party understands what is happening and what is being discussed, and that the party is able to speak on his/her own behalf."

A. **HOW DO WE DETERMINE A PARTY'S CAPACITY AT THE MEDIATION TABLE?**

My focus here is on an assessment of capacity "at the table" and not before the mediation has begun in part because this was the situation brought to me, and in part because I'm of the mind not to try to assess this prior to sitting down with folks. Intake is likely to screen out the exceptional and extreme cases, and I'm inclined towards the mediation table being a place for all, at least to start.

Let's begin with what we are determining. Mediators are not in a position to determine a party's "mental health status." We are interested instead (and clearly more qualified) to insure that a party is able to participate in a mediation in a meaningful way. Fundamentally, mediators will want to be sure a party understands what is happening and what is being discussed, and that the party is able to speak on his/her own behalf. Beware of assumptions from assertions such as "I'm being treated for mental illness." This could be anything from therapy to address mood disorders (depression and anxiety to bi-polar) to treatment and medications for major thought disorders (breaks with reality, psychotic episodes, schizophrenia). As we mediators generally do, we will get curious (!)

If someone offers the information that they are being treated for mental illness, I would find a way to ask why she mentioned this. "How do you think this might impact our conversations together?" "How do you imagine I might be helpful differently, knowing this?" "What do you think this means for our meeting and talking?"

Let's take a closer look at "meaningful participation" so we can begin to frame what NOT meaningfully participating looks like.

Meaningful participation:

- The party understands the operating principles of the mediation. (The mediator may or may not get a sense of this initially, given how most introductions to mediation go).
- The party is able to follow a line of thinking, can responsively answer questions with relevant answers. (There is a wide range of how any one mediator might judge "relevant", and of course even more importantly a potentially more involved process for a mediator to help a party articulate

Continued on next page

their connections and sense of relevance).

- The party is able to generate their own wishes relative to the situation.

Consider these three categories as ways a party might not be "at capacity" to use mediation: THOUGHTS, EMOTIONS, RELATING SELF AND OTHER, and SUBSTANCE USE.

a. cognitive capacity: ability to understand what is happening, what is being discussed; to be able to track a conversation; to be able to follow lines of thinking and the development of ideas, to be able to take in information and use it.

b. emotional stability: ability to regulate one's feelings enough to be able to use cognition and to engage with others effectively enough.

c. Relational competence: is this person able to engage with the other party while still having their own voice? Is this person able to engage with the other party in a way that allows for the other to have their own voice? (power dimensions).

d. Substance use/abuse: if someone's awareness/judgment/ consciousness is altered by a substance, he/she may not be able to think clearly enough or regulate feelings enough to participate.

The above questions of meaningful participation of the party is one way we might look at this question. We might also think about this in terms of our capacity to help, to participate meaningfully as a mediator. If WE aren't able to follow the line of thinking of a party, or if WE aren't able to help a party manage their emotional state, we might assess that we, or this process, is not a good fit for them at this time.

Co-mediators would take a break to review concerns, observations and possible strategies. Solo mediators might break to assess. Options for further assessment always include private sessions, or stopping for the day but not necessarily ending the mediation.

If mediators conclude that a party seems unable to participate in a meaningful way, and/or that the mediators are not able to offer help to these folks at this time, then how to proceed?

B. **IF NECESSARY, HOW DO WE EXIT?**

What do we say to the parties? If mediating in a court setting, what would we report to the court?

Here are a few thoughts and phrases that might be helpful in exiting a case in these circumstances. The tension is between explaining so that people aren't confused or scared or upset, and over sharing in a way that characterizes one person unfavorably or gives ammunition to the other side.

Once you've decided mediation is

not the right fit for these folks at this time, here are some ways to talk about exiting.

"People in dispute need different sorts of help at different times. We'd like to meet with you each separately to discuss your different needs at this time and what resources you each have to get the assistance you might need right now."

"It seems to us that there is a lot of confusion and we don't think we're going to be able to help you through the confusion here."

"There are many situations and times when mediation just isn't going to help. We think at this point, this is one of those times."

"We've come as far as we're going to be able to go."

"Often in a mediation there comes a point when it just seems we can't help parties move forward anymore. It's our sense that we've helped as much as we could."

"Sometimes a particular conflict just isn't suited for mediation."

"We are having a difficult time following the thinking here – we think this is as far as we can take the conversation."

And then, "we thank you for giving this a try, and we're sorry we couldn't have been more helpful."

These are the sorts of "exits" I could imagine in such a case.

If in a court setting:

Generally, since we don't tell the court in other situations how the mediation went and why it might have broken down, we can start with this practice with these cases. The court is fully capable of determining capacity for their purposes (and does so all the time when a case hasn't been first in mediation). The exception to saying nothing would be if you have concern for someone's safety, in which case you would be asking what needs to happen to keep someone safe? In this case, you may have previewed the exception to the confidentiality and you are following your stated practice. If your concern for someone's safety has not been previewed in your introduction, you'll proceed by putting safety first. This is not a bright line, and will require your best thinking regarding the resolution of confidentiality and party self-determination and safety.

It can be a challenge to withhold information that we think would be helpful to both the court and to the parties, but "helpful" can't be the standard for breaking confidentiality or superseding party self-determination.

Jeanne Cleary has been facilitating difficult and transformative conversations for over 25 years in numerous settings. In her private practice in Watertown, MA Jeanne provides relational and couple counseling, mediation, and consultation in conflict strategies for families, and corporate, religious, non-profit and educational organizations.

OVERCOMING RELUCTANCE TO ENGAGE IN MEDIATION

By Laura Athens, Esq.

Many attorneys know and appreciate the benefits of mediation. Those who are familiar with the benefits of mediation readily propose and eagerly participate in it. However, should you encounter any resistance, how can it be addressed?

You do what any good mediator does: start asking probing questions to determine the underlying reason for the reluctance. This article reviews some common sources of resistance to mediation and ways to overcome it.

Lack of Understanding of Mediation and Its Benefits

Sometimes education of the hesitant party is necessary. You may need to explain what mediation is and what it is not. As prevalent as mediation is, some still do not fully understand the process. Reviewing some basic cannons may be helpful. Mediation is voluntary. The parties must choose to participate and may discontinue at any time. Engaging in mediation does not preclude pursuit of traditional litigation or other forms of alternative dispute resolution (ADR). The mediator has no authority to impose a decision or force any particular outcome. The mediator is a neutral, impartial professional who helps the parties communicate concerns, identify issues, explore options and reach solutions.

Confusion may arise concerning the different forms of mediation. The facilitative approach focuses on helping parties to discuss their interests, generate potential options and reach their own mutually satisfying agreement. In evaluative mediation, the mediator often shares opinions, evaluates legal positions and predicts likely outcomes to guide the parties in reaching a resolution. Transformative mediators empower the parties by fostering their recognition of each others' perspectives, building understanding and transforming the quality of their interactions.

You may wish to share the many benefits of mediation. Mediation promotes communication, collaboration and joint problem solving. It is efficient and cost effective. Confidentiality and privacy are protected. Mediation provides the parties with an unparalleled opportunity to craft a unique agreement that -- with the help of the mediator and legal counsel -- addresses their particular concerns. Together, the participants are able to reach innovative, mutually satisfying and enduring solutions that neither party, nor a judge or jury, would have contemplated.

Mediation is particularly advantageous to parties who have a continuing relationship. The mediation process builds trust and rapport, preserves the relationship, and teaches fundamental negotiation skills that can be utilized if and when future disputes arise. Parties actively engaged in the negotiation process tend to be more invested in the result and less likely to pursue future litigation.

Concerns about the Mediator

At times, opposition can stem from the mediator proposed by a party. Opposing counsel or their clients may not be comfortable with the style or reputation of a proposed mediator. They may have had a negative prior experience with the mediator or the entity with which the mediator is associated. Some may prefer a mediator with subject matter expertise; others may prefer a mediator who uses a particular approach.

"[Y]ou may want to point out that mediation serves many purposes and is valuable at any stage of litigation."

Some may wish to pursue private mediation; others may wish to utilize an alternative dispute resolution center. In some cases, mediation is available through a judge or magistrate who is not presiding over the case. If there is a concern that the other party will reject a particular mediator based on a perception of bias, Professional Resolution Experts of Michigan (PREMi) offers a diverse panel of seventeen neutral ADR providers with a wide-range of subject matter and process expertise to assist legal counsel and their clients to resolve disputes.

Concerns about the Mediation Process

Mediation is not an all or nothing proposition. One of the hallmarks of mediation is that the process is flexible and user friendly. If you sense that an attorney is interested in mediation, but seems concerned about it being premature, you may want to point out that mediation serves many purposes and is valuable at any stage of litigation. Engaging in mediation early can clarify the issues in dispute, promote informal and expeditious discovery, result in full or partial resolution and make the entire litigation process less adversarial.

Selection of a mutually convenient time and place for the mediation is crucial. Careful and deliberative planning of the time, place and duration of the mediation, consideration of the needs of all participants is essential. Pre-planning allows the parties to focus on negotiation, rather than being distracted by other concerns. If work or other obligations preclude pursuit of mediation during normal business hours, many mediators offer flexible evening or weekend options. A good mediator will work to accommodate the schedules of the participants and ensure that all participants are comfortable with the time and location of the mediation session. If necessary, rely on the mediator to help you plan the mediation process and identify the key participants to foster collaboration and promote an optimal outcome.

Cost Concerns

A disparity in the economic resources of the parties often exists. An even split of the mediation costs is not always an equitable arrangement. Each party's ability to contribute to the costs should be assessed. To reach a fair cost sharing arrangement, you may wish to suggest proportionate payment of the mediation

Continued on next page

costs based on the respective resources of the parties. Mediation costs should not serve as an obstacle when utilization of it often results in substantial cost savings as well as greater satisfaction with the outcome.

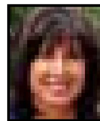
"Those who have limited or no mediation experience, may feel like a 'fish out of water.' The philosophy underlying mediation may be counterintuitive and foreign to them."

Unfounded fears

Those who have limited or no mediation experience, may feel like a "fish out of water." The philosophy underlying mediation may be counterintuitive and foreign to them. Mediation requires a paradigm shift from positional bargaining to joint problem solving. Attorneys are accustomed to zealously advocating and defending the client's position, not focusing on the interests of both parties.

Some attorneys may fear that if their clients can reach agreements with the help of a mediator, then legal representation may be viewed as superfluous. Because the mediator's role is to facilitate the parties in reaching a mutually agreeable resolution and not to provide legal advice or usurp the role of the attorney, the parties often want and need legal representation during mediation. While the lawyers' roles shift from zealous advocates to trusted legal advisors in mediation, their counsel is equally valuable. Clients will continue to rely on their attorneys to advise them of their legal options, assist them in evaluating potential solutions, drafting settlement terms and protecting them from exploitation.

You may be concerned that proposing mediation may be perceived as a weakness. However, proposing mediation demonstrates to your clients that you understand the importance of seeking more expeditious and economical ways to resolve disputes. Fewer clients are willing to tolerate the extraordinary costs, considerable time commitment and excessive delays associated with traditional litigation. Mediation allows parties to be masters of their own destiny. By promoting mediation as an option, attorneys enable their clients to take a more active role in the dispute resolution process and have more control over the ultimate outcome. Successful, expeditious resolutions will lead to more satisfaction, increased perceived value and generate more business. Your clients will thank you for suggesting mediation and will be more likely to refer their colleagues and associates to you.



Laura A. Athens is an attorney, mediator and arbitrator in Farmington Hills, Michigan. Her practice focuses primarily on education law and disability rights. She provides legal representation and alternative dispute resolution (ADR) services in special education matters.

BUILDING A PROFITABLE AND SATISFYING PEACEMAKING PRACTICE: SEMINAR REPORT

By Rackham Karlsson

How does one build a profitable and satisfying peacemaking practice? On June 19 and 20, 2015, Woody Mosten and David Hoffman conducted a seminar designed to answer that question. A group of about eighteen participants, including lawyers, mediators, and other professionals, gathered in the large conference room at Boston Law Collaborative to hear Mosten and Hoffman share their insights on models for peacemaking practice and how to make those models the cornerstone of one's practice. Afterward, many of the participants jumped at the opportunity to share their experiences, which were overwhelmingly positive. By all accounts, the two-day seminar was informational, inspirational, and perhaps even life altering.

"More than one participant, including Mosten, shared stories of anxiety, erosion of family life, and a sense of disconnect between personal principles and the nature of adversarial practice."

Underlying the seminar's themes was a shared sense that adversarial modes of dispute resolution are emotionally and financially draining not only for the parties, but also for the professionals involved. More than one participant, including Mosten, shared stories of anxiety, erosion of family life, and a sense of disconnect between personal principles and the nature of adversarial practice. One participant compared litigation to a battle that "causes us to sustain a soul injury, which comes from the sense of responsibility we don't always recognize or allow ourselves to feel, for the harm we do every day to others (and to our own values) in the cause of helping our clients…. It's not JUST that the work is stressful, it's that it wounds us."

Mosten and Hoffman were careful to clarify that the object of the seminar was not to dismiss litigation entirely as a dispute resolution model. At Boston Law Collaborative, for example, litigation is available as an option in limited circumstances, and Hoffman suggested that litigators could bring a peacemaking approach to bear even in adversarial settings — and that doing so would be well received by judges. Still, many participants expressed a desire to eliminate litigation from their practices entirely. In the seminar's closing roundtable discussion, several announced plans to do just that; one participant went as far as announcing a date by which she would not longer take litigated matters.

Throughout the seminar, Mosten and Hoffman offered practical suggestions on how to move away from litigation, starting with establishing a consistent

Continued on next page

identity as a peacemaking professional. Lawyers were encouraged to give peacemaking services top billing, including collaborative law, mediation, mediation support, and limited scope representation. While there was significantly less advice directed at non-lawyer mediators, the general theme was the same for all professionals in the room: clients often choose litigation because they don't know the alternatives exist. The professionals who guide the process have a unique opportunity to increase awareness of those alternatives. As one lawyer participant wrote, "[W]e hold great power over the people that come through our door.... They trust that we have truly looked at their issues and are advising what is best for them." Having already applied the seminar's lessons to reshaping her client intake process, the same lawyer observed, "It ... felt like an epiphany to have a practice where my goal was to create a process for my client, not fit them into one that I was most comfortable in."

practice. Clients tend to pay more readily because they are happier with the service being offered, in part because they are purchasing the process as much as, if not more than, the specific outcome. Mosten shared handouts that he uses to set client expectations about costs, and indeed, both Mosten and Hoffman were generous with the volume of personal practice materials that they made available to the participant: more than fifty documents ranging from academic articles to draft letters, agreements, and forms.

For many participants, the seminar provided the inspirational push they needed to make a professional change that had been on their minds for some time. For one participant, "Woody and David gave me the confidence to step out of my comfort zone and really embrace the possibilities. It is amazing how different it feels." Similarly, another participant expressed, "This training has the potential to be life changing for anyone thinking of stopping or cutting back their litigation practice." Another wrote that the seminar "[i]nspired me to take the leap to a peacemaking practice."

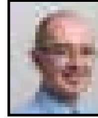
"For many participants, the seminar provided the inspirational push they needed to make a professional change that had been on their minds for some time."

Of course, the seminar would not have been complete without discussion of the financial aspects of peacemaking practice — the "profitable" part of the title. Mosten offered the enlightening observation that payment rates can approach 100 percent in peacemaking

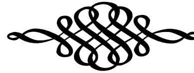
If there was one consistent complaint about the seminar, it was that everybody wanted more information about specific topics. "The knowledge possessed Woody and David is so massive that two days could not do it justice," one participant observed.

(Mosten does offer both longer and shorter versions of the seminar, some of which he hosts from his home in California.) Mosten and Hoffman acknowledged that they were barely scratching the surface of a tremendous body of knowledge and provided an extensive reading list for further education. Additionally, they encouraged participants to form reading groups together, and to each enlist their own "board of advisors," drawn from various disciplines, for guidance and support along the path toward a profitable and satisfying peacemaking practice.

This being a publication about mediation, readers are undoubtedly already familiar with the many benefits of peacemaking practice. For those who are on the fence, and particularly lawyers who are curious about making peacemaking practice their bread and butter, this seminar is sure to be an eye-opener.



Rackham Karlsson
(rhk@rhklawoffice.com)
of Zephyr Legal Services, LLC in Cambridge



THE FUTURE OF MEDIATION

By John Ford

"If civilization is to survive, we must cultivate the science of human relationships - the ability of all peoples, of all kinds, to live together, in the same world at peace." ~ Franklin D. Roosevelt

A coach once asked me to predict which way a drop of water would go around a rock up ahead. Of course there is no way of knowing: the water drop may not make it due to evaporation to the atmosphere, absorption by the river bank, and then if it does make it to the rock, whether it goes left or right, over or below. However, even if the future is uncertain, we can still comment on where the drop of water is at the moment. Even its relationship to our imagined future. And of course about its past.

When did mediation start?

I wonder when the first human chose not to resolve a conflict or dispute of others by telling them the solution but supporting them to find their own. Especially where they had power to impose (make and enforce) a solution. And how many such interventions have been made through the course of human time.

Mediation is both an idea and a process. As an idea it promotes self-responsibility and embraces self-determination. It believes in the ability of humans to take care of their own lives. As a process it has evolved to a point where there are many difference approaches (facilitative, transformative, narrative, party directed, and evaluative) that all use the term mediation to define how the idea is brought to life.

The field of mediation

The idea and process of mediation appear to be enjoying an expansive phase in their history. A self-organized field of mediation has gained self-awareness of the uniqueness of the process and the importance of its role. Some call it a profession. International and regional membership associations for mediators that create voluntary standards of conduct are common.

Debate amongst proponents of different approaches at conferences of professionals who self-identify as mediators is lively. For the most part mediation has been based on intuitive insights of how to resolve conflicts - coupled with reflective practice. More recently we are seeing the emergence of an evidence based or scientific approach to mediation knowledge.

Mediation in contemporary society

Mediation continues to be practiced in many diverse ways around the world both by professional and community members. Mediation has found fertile ground as an idea in many legal systems. The motivation has been varied. Some have advanced more practical social benefits like cost savings while others point to the quality of the decision made in mediation, and more abstract values like self-determination.

The field of mediation has created specializations in a variety of areas such as family, workplace, elder, environmental, commercial and the like. And some professions like HR, realtors, and hospital administrators who routinely find themselves at the intersection of conflict have also started to embrace and internalize the process (skill) of mediation.

Governments of the world are increasingly including mediation as part of the resolution process to address civil right disputes especially in labor, employment and family arenas. Some even provide the mediator's.

"I believe that the biggest role mediation has to play, is as a process that is institutionalized within the social fabric of our interactions with one another, not just when we are at the court house steps, but when our differences are first emerging, wherever we happen to be."

While there is a growing general awareness of mediation, specific awareness of mediation as a valuable or indeed as an applicable option, is low.

World Peace

One way we venture into the future is through vision statements. Like Roosevelt, my vision is world peace. My only question is how long will it take?

Clearly we are not there now, and as result I anticipate that the popularity of mediation as an idea and process will expand and contract cyclically but with a steady incline as we get closer to world peace.

And in my vision, peace is not the absence of conflict. At this point mediation and other collaborative, non-aggressive processes will have become the norm. The violent and adversarial past will be something people read about and find hard to comprehend! Humans are getting less violent and yet continue to invest in aggressive and violent approaches to conflict resolution.

Until then

In the more short term I anticipate more scrutiny of the mediation process, especially in the legal context, with developments being more evidence based than intuitive. The courts will be rich learning grounds for insights, in part because the participants will test the limits of competition within a collaborative frame of reference, such that mediation provides.

Where I see the biggest opportunity however, is not in the legal system. I believe that the biggest role mediation has to play, is as a process that is institutionalized within the social fabric of our interactions with one another, not just when we are at the court house steps, but when our differences are first emerging, wherever we happen to be.

Continued on next page

The Reality

However, given the current low social awareness of the value or applicability of mediation, education of both end users but also providers will be crucial. I see this as an ongoing challenge. For example, currently in the United States, most HR professionals know about mediation but believe that it is something that other professionals do.

Interestingly, the largest professional membership organization for HR professionals in the world, the Society for Human Resource Management (see below), has established competency standards for certification that expect senior leaders to be able to mediate difficult situations among employees.

As this happens, and similar positive developments take place in schools, businesses, clubs and homes we will seed the slow ongoing improvement in the ability of humans to live together in peace with others. Mediation will continue to have an important role to play.

The 2014 SHRM Competency Model: Relationship Management

The SHRM competency model identifies nine competencies that define what it means to be a successful HR professional. The model offers two levels of certification: the certified professional (SHRM-CP) and senior certified professional (SHRM-SCP) levels. The content of the SHRM Competency Model was validated through a survey of over 32,000 HR professionals.

Relationship management is one of nine competencies and contains numerous mentions to mediation and conflict management. The others are communication, ethical practice, HR expertise, business acumen, critical evaluation, global and cultural effectiveness, leadership and navigation, consultation.

Relationship Management

Relationship management is defined as *"the ability to manage interactions to provide service and to support the organization."*

"In order to develop this competency, HR professionals should ***maintain productive interpersonal relationships and demonstrate aptitude to help others to do the same.*** *Healthy interpersonal relationships among employees at an organization contribute positively to employee and organizational success."*

Competencies with Conflict Engagement Responsibilities

Early level expectations focus on:

- Listening without immediately providing the solution,
- Making referrals of difficult situations to their manager,
- Preventing transactional conflicts and when that is not possible facilitating their resolution,
- Providing information about conflict resolution options, and
- Developing a reputation as a neutral and approachable HR representative.

Mid-level expectations focus on:

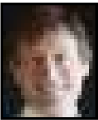
- Recognizing potential employee relations issues in a proactive manner and resolving the issue,
- Mediating difficult interactions, and escalating problems when warranted,
- Developing a reputation as a neutral and approachable HR professional serving employees and the organization,
- Fostering a positive team environment among staff, and
- Facilitating conflict resolution meetings.

Senior level expectations focus on:

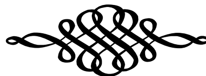
- Mediating difficult employee relations as a neutral party,
- Developing policies and practices for resolving conflicts,
- Resolving escalated conflicts among stakeholders,
- Managing challenging issues in union and non-union environments,
- Negotiating with internal and external stakeholders,
- Building consensus and settling disputes internal to HR on policy and practice decisions, and
- Facilitating difficult interactions among organizational stakeholders to achieve optimal outcomes.

Executive level expectations focus on:

- Creating conflict resolution strategies and processes throughout the organization,
- Negotiating with internal and external stakeholders to advance the interests of the organization,
- Fostering a culture that supports intra-organizational relationships throughout organization,
- Proactively developing relationships with peers, clients, suppliers, board members, and senior leaders.

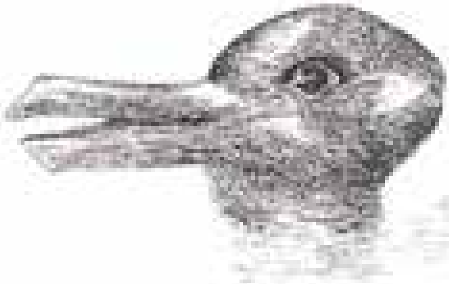


John Ford is the author of Peace at Work and founder of the HR Mediation Academy. He mediates; trains; and consults to organizations that have accepted the inevitability of conflict and are seeking to approach it with greater clarity and confidence. He was the managing editor of Mediate.com from 2000 to 2011, and is a past president of the Association for Dispute Resolution of Northern California.



THE OBSERVER EFFECT IN FAMILY CONFLICT

By Justin Kelsey, Esq.



Duck or Rabbit?-

from Wikimedia Commons

The recent appellate decision in the Ventrice case sparked a great discussion on the MBA's My Bar Access forum, which was started by William Driscoll the appellate counsel for the successful party in that case. The discussion ranged from constitutional and statutory issues, to an examination of the court's ADR referral program. One comment in particular, though, just didn't ring true for me:

"My personal impression is that mediation works great for those clients who can discuss the issues like adults, but in my experience those are few and far between at least in the beginning of the process. Then, even those clients who are interested tend to lose interest when weighing the cost of paying their attorney's and a mediator to go over the issues and trying to find a compromise, when they either do not want to compromise or are doubtful of the other side compromising." - An attorney who describes himself on Avvo as advocating "fiercely" for his clients.

It's great to have another perspective and it's interesting to see the path that a lively discussion about an appellate case can take, but I felt compelled to respond to this comment and the implication that most cases cannot mediate effectively. Here was my response:

I've heard many times from those who primarily litigate that the majority of their clients usually want to take at least one issue to court and are unable to compromise. For the first four years of my career when I only litigated, and before I took the mediation training, that was my experience as well. However, that is no longer my experience, which means one of two things. Either my client base has changed or I have changed. Either a different self-selecting group of clients is walking into my office now, or there was something about the litigator version of myself that had an effect on my clients' willingness to settle. Or maybe it's a mix of both.

While it is certainly true that there are people who seek me out now specifically for out-of-court representation or mediation, I still receive a significant number of referrals and web inquiries from people who don't yet know how they want to proceed. I believe we have a great influence on those undecided or uneducated potential litigants by how we handle that first meeting. We are not disconnected observers, and we must do a better job of recognizing our own influence on the process. Let's call it

the Observer Effect of family law - **how we measure the conflict between people has an effect on how they choose to resolve that conflict.**

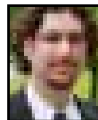
My theory is difficult to test by experimentation because it's not possible to have the same people walk in for my initial interview and then walk in, unaffected, for a litigators' interview, or vice versa. However, the data provided by Dr. Emory in his Mediation Study is pretty compelling. With a flip of a coin his study decided whether couples who had already filed for a custody hearing would try mediation, and 80% settled their cases. Those numbers just don't match with the anecdotal observation that most couples can't settle in mediation.

With that empirical data available to us, I think we have to look harder as practitioners at how we affect the decision of clients to fight or talk. When a potential client walks into our office and tells us about the difficulty reaching agreements with their unreasonable ex, the conversation that follows will be very different depending on what assumption I start from. Do I assume that they can't work it out or that they can, if only they had the help of a trained professional? If I start with the assumption provided to us by Dr. Emory, that 80% can settle, even if they've already filed a request for a custody hearing, then I wonder how many more of those people would settle.

"[I]f you really care about the well-being of your clients and their children, then when they walk into your office and ask for your help you have to ask yourself: is it you that wants to fight or is it them?"

Most lawyers, especially those comfortable in litigation, are competitive Type-A personalities. But if you really care about the well-being of your clients and their children, then when they walk into your office and ask for your help you have to ask yourself: is it you that wants to fight or is it them?

I find myself asking that question every time I get a nasty letter or e-mail from an opposing counsel and my initial instinct is to fire one back. Or whenever a particular issue in a case hits on one of my own personal biases. But if I ask myself constantly whether I want to fight this issue or my client does, it usually leads to an even more powerful question: what is the best way to respond in this situation to accomplish my client's goals? The more I ask that question the less often I find that the answer is litigation.



Justin L. Kelsey
(jkelsey@skylarklaw.com)
of Skylark Law & Mediation, P.C.
in Framingham

BEYOND EMAIL: THE WISP

By Dave Mitchell, Esq.

In this regular column, we examine how technology is and should be used in the practice of mediation. We try our best to keep it "user-friendly." In this issue, we review the Commonwealth's information security requirements passed in an effort to reduce identity theft and fraud regarding Massachusetts residents.

It is our hope that this regular column will be an effective resource for improving your practice. To that end, you are encouraged to contact any of the contributors with questions or suggestions for articles. Our contact information can be found at the end of this column.

Among the cardinal virtues of a mediator is confidentiality. The word perhaps brings to mind fellow practitioners who are slightly too talkative about their clientele. What many do not realize, though, is that the security measures you employ (or fail to employ) to securely store and transmit clients' information may have just as big of an impact on who learns that information.

Since the Massachusetts regulations 201 C.M.R. 17.00, et seq., went into effect on March 1, 2010, considering data security has turned from merely a best practice to a necessity. Even though client confidentiality is rightfully a primary concern of mediation practices, do not forget that the regulations apply equally to information your practice has on its own employees.

What follows is a walk-through that describes who must comply with the regulations, discusses the written information security policies (WISPs) that all covered businesses and individuals must create, and provides suggestions on how to comply with those requirements.

1. **All businesses handling "personal information" regarding any resident of the Commonwealth must comply with the regulations**

Almost without a doubt, you must comply with the regulations. If your mediation practice has access to "personal information about a resident of the Commonwealth," whether that resident is a party, a client, or an employee, then it is subject to the regulations. "Personal information" is defined as a Massachusetts resident's last name combined with either that person's first name or first initial, plus one or more of the following:

- Social Security number
- Driver's license number or state-issued identification card number
- Financial account number, credit card or debit card number

2. **What doesn't count as personal information?**

Although it is rare in the work of a family law mediator, any information

lawfully obtained from publicly available information is not personal information and is not within the scope of the protections of the regulations, even if it would otherwise be covered. However, it is almost certain your practice handles other sorts of personal information and would, therefore, be covered by the regulations.

3. **Duties imposed on the storage and transmission of personal information**

Regardless of whether your practice uses computers or not, it must develop, implement, and maintain a written information security policy (WISP) outlining certain minimal information security practices, as well as the steps taken to ensure employee compliance with those policies. If you fail to comply, your practice could be subject to civil penalties, regardless of whether that personal information was actually used to that person's detriment or not. E.g., See http://bit.ly/1KI5ffg, ¶6.

The exact contours of your practice's WISP may vary, as discussed more below in the section on drafting the WISP. However, all WISPs must touch upon the following, which are listed in 201 C.M.R. 17.03(2):

- Designate employee(s) that will implement the WISP
- Assess "reasonably foreseeable" risks to the security of personal information due to inside jobs and outside threats
- Create security policies for whenever an employee brings hard or electronic files containing personal information off of the business premises (includes laptops)
- Impose mandatory disciplinary measures for violations of the WISP and document responsive actions taken (including mandatory post-incident review)
- Prevent former employees' access to personal information
- Oversee service providers, including by provisions in each service contract, to require their compliance with the regulations
- Store personal information under lock and key
- Regularly monitor the effectiveness of WISP policies and upgrade safeguards as necessary
- Review the scope of the WISP at least annually and whenever there is a material change in business practices that may "reasonably implicate" information security (e.g., a switch from physical server to cloud server)
- Train employees in the WISP policies

Your practice almost certainly stores or transmits personal information electronically (e.g., server storage or emails with PDF scans of financial statements). If so, your WISP must also detail your computer and wireless security system. Because this is a "user-friendly" column that does not suppose any familiarity with technology,

Continued on next page

we assume that your knowledge of computer and wireless security might be limited. For that reason, we encourage you simply to browse the requirements of 201 C.M.R. 17.04, but more importantly that you direct all companies servicing your technological needs to that section to ensure that they will comply with the requirements and are setting up your computer system in such a way that requires you to comply, as well. And remember, you now must include in your service contracts that they comply with these regulations. Briefly, these regulations cover the following:

- Who has access to which files and by what means
- Limitation of access to personal information to a need-to-know basis
- Encryption
- Monitoring for unauthorized use of the computer system
- Computer-based security from threats (e.g., firewall, antivirus and anti-malware software, security patches)
- Education and training of employees on compliance with the computer security portions of the WISP

4. **Suggestions in drafting your WISP**

Without offering specific legal advice for drafting your own WISP, here are some considerations. In general, remember that the glove must fit the hand: your security measures must be a reasonable response to the "reasonably foreseeable" security risks your practice faces. So while you may not be expected to protect against a coordinated international assault on the personal information that, say, a credit card company might, your WISP must be appropriate for the (a) size, scope and type of your practice; (b) amount of resources available for WISP implementation; (c) amount of stored data; and (d) need for security and confidentiality of the personal information.

Your use of email to transmit client files, laptops with client information, storage of personnel records, etc., creates certain vulnerabilities that your WISP must address. A number of suggestions for security policies jump to mind:

- Do not forget to consider the personal information of employees as well as parties and clients
- If your practice provides laptops to employees to do work outside of the office, use a virtual private network (VPN) and encrypt the hard drive
- Use good passwords for everything! To see just how easy yours is to crack, check out http://bit.ly/Kz6V00. How many "doors" does that password unlock and when was the last time you changed it?
- Either encrypt email attachments with personal information, or scratch out all but the last few numbers. We covered this and similar solutions in more detail in the Winter 2015 issue.

- Immediately terminate former employees' access to personal information. This includes retrieving physical keys as well as changing the password for their computer logon as minimum steps.

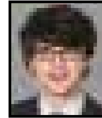
- While not technically a WISP issue under 201 C.M.R. 17.00, note that the credit card companies you have agreements with to process party payments likely have their own information security requirements. Failure to comply could result in fines or not being able to process cards at all. E.g., See http://bit.ly/1D1NHDv for the biggest credit card companies' requirements.

For more nuts and bolts advice on what to include in your WISP so that it complies with the regulations, see http://1.usa.gov/1q6OuSY, a compliance checklist published by the Office of Consumer Affairs and Business Regulation. Also be sure to consult with http://1.usa.gov/1H8sJrw, a small business guide to drafting a WISP.

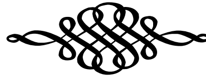
We wish you the best of luck.

Do you have a suggestion for a future column or thoughts on WISPs?

Let us know!



Dave Mitchell is a May 2014 graduate of Northeastern University School of Law and former Project Manager at Boston Law Collaborative, LLC. He recently passed the California Bar.



"You can't start the next chapter of your life if you're rereading the last one."

Anonymous

HOW CAN YOU SAY THAT?

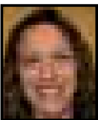
By Kate Fanger

Words can float boats or sink good will. Choosing words carefully is not the small stuff, in work or life, but is particularly important in conflict conversations like divorce mediation. Have questions about what phrasing to use with clients (or other professionals) in those tricky and sticky situations? Please send me your challenges: KF@katefangermediation.com

Please write to me if you have a question or comment - especially if you see things differently!

"One client keeps staring, in a very hostile manner, at the other spouse, but not saying anything. When I ask him if there is something he would like to say to her, he snaps "I just need a moment to collect myself", but then he keeps staring. It's definitely a "if looks could kill" kind of stare, and the other client is not looking at him, but I'm sure is aware. What do I do?"

This can be complicated to address. You don't want to assume that it is a problem for the client being stared at, so you must ask. If she says that it bothers her you can turn to the glowerer and ask if there is something he needs to say that you could help with. You can also offer to caucus for a few minutes (if you caucus) and check out each party's experience and wishes around the dynamic that way. If she does not respond, what you do will depend on your own feelings and instincts. I had something very similar happen once, and for me there were two parts to it: first, aside from wife's reaction it made *me* uncomfortable-- it was much more hostile than much of the language I hear; second, my feeling was that leaving it unaddressed was going to be a problem process-wise, and could snowball. If I said nothing, would the husband take it as support for his behavior, or a sign I was either on his side or *not* on hers? Would the wife feel the same way, or believe I could not stand up for her or create a safe environment for the mediation? In my case, the wife's answer to my question was somewhat ambiguous, so I chose to say to the husband: "You appear to be very angry but I'm not sure about what. Is it something you could share with us in a way that will help move things forward? Or would you like to take a minute (break)?" I was both pushing him to verbalize, and also framing what I wanted him to do: something not just aggressive, but constructive. I also gave him an "out" from speaking (in anger), and a chance to save face. He chose to leave the mediation room for a few minutes, and when he came back said he had been able to "get a hold" of himself, and was ready to continue.



Kate Fanger is the face and voice of Kate Fanger Mediation in Somerville MA, where she offers divorce mediation, marriage mediation, conflict coaching, parent/teen communication coaching and professional supervision. She can be reached at KF@katefangermediation.com

WHAT'S NEWS? NATIONAL & INTERNATIONAL FAMILY NEWS

Chronologically Compiled & Edited by Les Wallerstein

Divorce May Be Bad for the Heart, Especially for Women

Researchers used a nationally representative sample of 15,827 adults ages 45 to 80, all of whom were married or had been previously. The study, published in Circulation: Cardiovascular Quality and Outcomes, began in 1992, and the participants were interviewed every two years through 2010. About one-third of the people in the study were divorced at least once in their lives. During the follow-up, 1,211 of the participants — about 8 percent — had a heart attack. After controlling for age, race and ethnicity, obesity, hypertension, smoking, alcohol consumption and other health and lifestyle factors, the researchers found that compared with a woman who was continuously married, a woman who had been divorced once had a 24 percent increased risk of heart attack. Those who had been divorced twice had a 77 percent increased risk, and remarried a 35 percent increased risk. In men, only those who had divorced more than once had an increased risk of about 30 percent. Men who stayed married or who remarried had no increased risk. (Nicholas Bakalar NY Times, 4/16/2015)

US Birth Rates & Mothers' Education

The share of highly educated women who are childless into their mid-40s has fallen significantly over the last two decades, according to a new Pew Research Center analysis of data from the Census Bureau. The decline is steepest among women in their 40s who have an M.D. or Ph.D. Last year, 20 percent reported having no children, compared with 35 percent in 1994. Among those who have a master's degree or higher, 22 percent are childless, down from 30 percent in 1994. Although it is closing, there is still an education gap as it relates to fertility and family size, with highly educated women less likely to become mothers or have a large family than women with little education. Among mothers with an advanced degree, 23 percent have only one child, and only 8 percent have four or more. But among mothers who did not complete high school, 13 percent have only one child, and 26 percent have four or more. (Tamar Lewin 5/7/2015)

The First US Same-Sex Marriage Was in 1971

Long before the fight over same-sex marriage began in earnest, long before gay couples began lining up for marriage licenses, Jack Baker and Michael McConnell decided to wed. The year was 1967. Homosexuality was still classified as a disorder, sodomy was illegal in nearly every state, and most gay men and lesbians

Continued on next page

lived in fearful secrecy. In 1970, in Minneapolis, Mr. Baker and Mr. McConnell became the first same-sex couple known to apply for a marriage license. Turned down by Hennepin County, they fought to the United States Supreme Court, where they lost their case in a one-sentence dismissal: "for want of a substantial federal question" that has reverberated in federal courts and played an indirect role in pushing same-sex marriage to the high court this year. With some legal sleight of hand, Mr. Baker changed his name to the gender-neutral Pat Lyn McConnell, though he continued as Jack Baker in public. They obtained a marriage license (in another county), and in 1971 they exchanged vows before a Methodist pastor and a dozen guests in a friend's apartment. Ever since, they have maintained that theirs was the country's first lawful same-sex wedding. The pastor, Roger W. Lynn, 76, calls theirs "one of my more successful marriages. They are still happily married, and they love each other." (Erik Eckholm, NY Times, 5/16/2015) *See photo at bottom of article.

Ireland Votes to Approve Same-Sex Marriage

Ireland became the first nation to approve same-sex marriage by a popular vote, sweeping aside the opposition of the Roman Catholic Church in a resounding victory for the gay rights movement and placing the country at the vanguard of social change. With the final ballots counted, the vote was 62 percent in favor of legalizing same-sex marriage, and 38 percent opposed. The turnout was large — more than 60 percent of the 3.2 million eligible voters cast ballots, and only one district out of 43 voted the measure down. The referendum changes Ireland's Constitution so that civil marriage between two people is now legal "without distinction as to their sex." It requires ratification by both houses of the Irish Parliament and the president. Though that is a formality, the date when gay and lesbian couples can marry will be determined in that process. The vote is also the latest chapter in a sharpening global cultural clash. Same-sex marriage is surging in the West, legal in 19 nations before the Irish vote and 37 American states, but almost always because of legislative or legal action. At the same time, homosexuality is illegal across much of the Middle East and gay rights are under renewed attack in Russia and parts of Africa. (Danny Hakim & Douglas Dalby, NY Times, 5/23/2015)

Guam Allows Same-Sex Marriage

After a federal judge struck down the island territory's same-sex marriage ban as unconstitutional, Guam became the first U.S. territory to allow marriage regardless of gender. About 160,000 people live on Guam, an island about 3,800 miles west of Hawaii. Its residents are U.S. citizens, but they don't have the right to cast ballots for the country's president. The territory elects a delegate to the U.S. House, but the delegate is not allowed to vote on legislation. Guam has no

representation in the U.S. Senate. (Grace Garces Bordallo, Associated Press, 6/9/2015)

The North-South Divide on Two-Parent Families

When it comes to family arrangements, the United States has a North-South divide. Children growing up across much of the northern part of the country are much more likely to grow up with two parents than children across the South. The new geographic analysis comes from a sociologist and a psychologist from the University of Virginia. They argue that these patterns — based on their analysis of census data — are important because evidence suggests that children usually benefit from growing up with two parents. It's probably not a coincidence, for instance, that the states with more two-parent families also have higher rates of upward mobility. Moreover, divorce is no longer the main reason that children do not grow up with both of their parents. Divorce has declined in recent years. So, however, has marriage, while single parenthood — and the number of children who never live with both parents — has risen sharply. Marriage and single parenthood don't break down along the same red-blue lines that divorce does. (David Leonhardt, NY Times, 6/11/2015)

North Carolina Allows Officials to Refuse to Perform Same-Sex Marriages

Defying their Republican governor, North Carolina lawmakers enacted a law that allows state court officials to refuse to perform a marriage if they have a "sincerely held religious objection," a measure aimed at curtailing same-sex unions. The measure is one of a string of bills in states like Indiana, Arkansas and Louisiana to allow people to circumvent equal protection for same-sex couples on grounds of religious freedom. It is also part of a series of sharply conservative bills passed by North Carolina's Republican-controlled legislature, including a bill signed last Friday by the governor that requires women who seek abortions to wait 72 hours before they can undergo the procedure. (Jonathan M. Katz, NY Times, 6/12/2015)

Industry's Growth Leads to Leftover Embryos, and Painful Choices

In storage facilities across the nation, hundreds of thousands of frozen embryos — perhaps a million — are preserved in silver tanks of liquid nitrogen. Some are in storage for cancer patients trying to preserve their chance to have a family after chemotherapy destroys their fertility. But most are leftovers from the booming assisted reproduction industry, belonging to couples who could not conceive naturally. Since the first American "test tube" baby was born in 1981, in vitro fertilization, at a cost of $12,000 or more per cycle, has grown to account for more than 1.5 percent of all United States births. In Illinois, the courts have said it should be a matter of contract. But judges in Massachusetts have said such contracts

Continued on next page

are not enforceable by the courts. Other courts have called for balancing the interests, and considering whether one party has no other option for having a baby, while others still have required mutual consent by the man and the woman when the embryos are to be used. Most courts have sided with the party who does not want the embryos used. When an embryo exists outside a woman's body, it seems, men and women have the same right not to procreate. (Tamar Lewin, NY Times, 6/17/2015)

Texas: Divorce of Same-Sex Couple Is Upheld

The State Supreme Court has upheld a divorce granted to a same-sex couple, a rare decision in a state with a constitutional ban on same-sex marriage. The court ruled that state authorities who tried to block the divorce did not have standing. The women were married in Massachusetts in 2004. The motion to block the divorce began about four years ago when the state's attorney general argued that since same-sex marriage is banned under the state's constitution, same-sex divorces cannot be granted by state courts. (The Associated Press, NY Times, 6/19/2015)

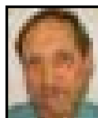
US Supreme Court Ruling Makes Same-Sex Marriage a National Right

The Supreme Court has ruled (by a 5-to-4 vote) that the Constitution guarantees a right to same-sex marriage. "No longer may this liberty be denied," Justice Anthony M. Kennedy wrote for the majority in the historic decision. "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than once they were." Marriage is a "keystone of our social order," Justice Kennedy said, adding that the plaintiffs in the case were seeking "equal dignity in the eyes of the law." The decision, which was the culmination of decades of litigation and activism, came against the backdrop of fast-moving changes in public opinion, with polls indicating that most Americans now approve of the unions. (Adam Liptak, NY Times, 6/26/2015)

Fate of Domestic Partner Benefits in Question After Marriage Ruling

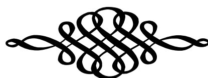
A national right to marry calls into question the fate of domestic partner benefits. Though it is unclear what most employers will decide, some companies are likely to deliver what feels like an ultimatum, at least to some: Marry within a certain time frame, or lose your partner's health care coverage. Some large employers — including Verizon, Delta Air Lines, IBM and Corning — already have. They rescinded domestic partner benefits to employees living in states where same-sex marriage was legalized and replaced it with spousal coverage. According to a National Compensation Survey from the Bureau of Labor Statistics, about 35 percent of all

private sector workers had access to domestic partner benefits for same-sex partners in 2014, and 30 percent of workers had access to benefits for opposite-sex partners. (Tara Siegel Bernard, NY Times, 6/29/2015)


Les Wallerstein is a family mediator, collaborative lawyer, and the founding editor of the FMQ. He can be contacted at 781-862-1099, or at wallerstein@socialaw.com

State of Minnesota

STATE OF MINNESOTA,



LETTERS TO EX-SPOUSES:...
AND I JUST WANTED YOU TO KNOW

Dear Colleagues:

I write to invite your assistance to participate in a unique educational opportunity. I am writing a book that will be a collection of actual letters to ex-spouses. These are not necessarily copies of letters that were ever sent to an ex-spouse, but are more likely to be letters divorced individuals would be writing now - for the first time, expressing to their former spouses what they just wanted them to know as they reflect back upon their marriage, divorce - and all that has followed.

My hope is that engaging in the actual introspection and writing of these anonymous letters will not only prove cathartic to the letter-writer, but will serve as a tremendous contribution to the professions of psychology, law, theology and medicine as judges, therapists, family lawyers, and clergy have much to learn from the breadth of experiences of those who have gone through the process. Just as importantly, however, dozens of those who have completed the surveys/letters have followed-up to tell me how cathartic the mere act of writing has been – even 10, 15, 20 years after their divorces, even though they thought they had closure.

I have received advance, express permission to share this letter with you. By doing so, perhaps you will understand how impactful this book promises to be.

Thank you for your efforts in helping to make this book a reality. Here is the link for the survey (and to write the letter). The survey takes about 2-5 minutes; the time it takes to write the actual letter varies, depending upon the individual; the resulting impact is immeasurable.
www.surveymonkey.com/s/XC89FQ9

Kind regards, Vicki

...And I just wanted you to know, good people can be bad together.

When failure is expected, unhappiness and misery are sure to follow.

I wasn't ready to be a good husband, father or partner when we started out, yet after we broke up, I became all three; growth that was only possible by getting away from you. Meanwhile, you sat, miserable, in the same job you hated, trading our marriage for an even more tenuous relationship with a married man that continues to this day.

I wish I could have been better, could have helped you become the person you wanted to be. But we are responsible for our own happiness first, only then can we make others happy. Expecting another person to fix everything is a recipe for failure.

I still feel badly about ending things, a decision we consider mutual but in reality was mine. Your inability to accept or embrace change existed before, during and after our marriage. Our relationship was built on competition and inability to compromise. Quarter was never given, forgiveness never granted.

You are a smart, funny and attractive person inside, but the fear, anger and mistrust you wear like a heavy coat against the coldest of winter days and it all but obscures those positive qualities. I'm happy for the time we had together, it helped me become who I am today. I hope you find true happiness someday as well.

MCFM NEWS

MEDIATION PEER GROUP MEETINGS

Peer Group Focused on Financial Issues in Divorce: Open to all divorce professionals, the purpose of the group is to focus awareness on the financial intricacies of divorce in an open forum that promotes discussion of a wide range of issues. Discussions will be led by Chris Chen, CFP®, CDFA™, Thomas E. Seder, CDFA™ and group members.

Morning Meetings are usually from 10:00 am to 12:00 pm at the offices of Insight Financial Strategists, 271 Waverly Oaks Road, Suite 2, Waltham. Seating is limited. **Please contact Chris at 781-489-3014, chris.chen@insightfinancialstrategists.com or Tom at 781-489-3014, to m.seder@insightfinancialstrategists.com for more information.**

Central Massachusetts Mediators Group: We serve mediators in Central Mass and towns along Rt. 2 West of Rt. 128. We meet to discuss topics and/or cases, sometimes with guest speakers, in the offices of Interpeople Inc. in Littleton. Interpeople is located about 1/2 a mile off Rt. 495, at Exit 31. Meetings begin at 8:30 AM on the last Thursday of every month, except December, July and August. If you are a family and divorce mediator — attorney or non-attorney — you are welcome to join us. **New members are asked to please call ahead of time: 978-486-3338, or email Shuneet at drthomson@interpeople-inc.com.**

North Suburban Mediators Group: Join fellow mediators meeting to learn and share and network. Meetings are held at 8:30 a.m. on the second Tuesday of the month from January to June and from September to November at the offices of Lynda Robbins and Susan DeMatteo, 34 Salem Street, Suite 202, Reading. **Please call Lynda at 781-944-0156 for information and directions. All MCFM members are welcome.**

Pioneer-Valley Mediators Group: This Western Mass group will be meeting monthly in December on the first Wednesday of every month at the end of the day, from 4 to 6 pm or 6 to 8 pm (depending on the interest) in Northampton at a location to be announced. **Please email Kathy Townsend for further info at Kathleen@divmedgroup.com.**

Mediators in Search of a Group? As mediators we almost always work alone with our clients. Peer supervision offers mediators an opportunity to share their experiences of that process, and to learn from each other in a relaxed, safe setting. Most MCFM directors are members of peer supervision groups. All it takes to start a new group is the interest of a few, like-minded mediators and a willingness to get together on a semi-regular, informal basis. In the hope of promoting peer supervision groups a board member will volunteer to help facilitate your initial meetings. **Please contact Kathy Townsend at Kathleen@divmedgroup.com, as she will coordinate this outreach, and put mediators in touch with like-minded mediators.**

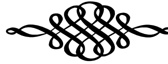
OFFER MCFM's BROCHURES TO PROSPECTIVE CLIENTS

Copies of MCFM's brochure are available for members only. Brochure costs are: **[10 brochures – $10, 100 brochures – $50. Postage included.]**, unless you pre-arrange to pick them up at a professional development meeting or other MCFM event. A blank area on the back is provided for members to personalize their brochures, or to address for mailing. **Remember: when you buy 21 or more brochures the "per copy" price is less than the cost to print!**

TO OBTAIN COPIES MEMBERS MAY

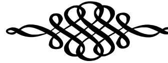
call Ramona Goutiere: 781-449-4430

or email: masscouncil@mcfm.org



AN INVITATION FOR MCFM MEMBERS ONLY

All MCFM members are invited to fill out the Member Profile Questionnaire posted on the MEMBERS ONLY page of mcfm.org and submit it for publication in the FMQ. Please email your questionnaire with a personal photo (head shot) and an optional photo of your primary mediation space (or office) to KF@katefangermediation.com. Since the questionnaire is intended to help others learn about you, feel free to customize it by omitting questions listed, or adding questions you prefer. Only questions answered will be published, and all submissions may be edited for clarity and length. **Please help us get to know you.**



THE FMQ WANTS YOU!

The Family Mediation Quarterly is always open to submissions, especially from new authors. Every mediator has stories to tell and skills to share.

To submit articles or discuss proposed articles
call Kate Fanger 617-599-6412
or email KF@katefangermediation.com

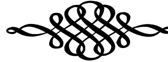
NOW'S THE TIME TO SHARE YOUR STORY!

HELP BUILD AN ARCHIVE!

In the spring of 2006, MCFM entered into an agreement with the Department of Dispute Resolution at the University of Massachusetts to create an archive of Massachusetts family-related mediation materials.The two key goals are to preserve our history and make it available for research purposes.

We're looking for anything and everything related to family mediation in Massachusetts — both originals and copies — including: meeting agendas and minutes, budgets, treasurer's reports, committee reports, correspondence, publications, fliers, posters, photographs, advertisements and announcements.

We need your help to maximize this opportunity to preserve the history of mediation in Massachusetts. **Please rummage through your office files, attics, basements and garages.** ***If you discover materials that you are willing to donate please contact Les Wallerstein at wallerstein@socialaw.com.***



CLASSIC MCFM "T" SHIRTS

Equal blends of cotton & polyester
Choose black or cream
CAN'T DECIDE? ORDER ONE OF EACH!
All lettering & graphics are green

SIZES AVAILABLE: S, M, L, & XL
SUPPLIES ARE LIMITED
Cost $10 each plus S&H*
***S&H: $3 for 1 shirt, $4 for 2, $5 for 3, etc…**
Make checks payable to MCFM, Inc.

SEND YOUR CHECK & ORDER TO:
Ramona Goutiere
P.O. Box 59
Ashland, NH 03217-0059

QUESTIONS? CALL: 781-449-4430

ANNOUNCEMENTS

* *

All mediators and friends of mediation are invited to submit announcements of interest to the mediation community to KF@katefangermediation.com, for free publication.

* *

Please save the date

14th Annual MCFM Family Mediation Institute

November 20, 2015

Wellesley Community Center

Keynote Speaker: Bill Eddy on working with high conflict couples

Additional details to be posted on the MCFM website by September 1st.

Kindly note we are trying to have Bill Eddy lead a Master Class on November 19 or November 21 for an additional charge.

Elder Decisions® - Elder & Adult Family Mediation Training

November 13-15, 2015

Newton, MA

This training provides mediators with tools and strategies for successfully mediating adult family conversations around issues such as living arrangements, caregiving, driving, family communication, medical decisions, Powers of Attorney / Health Care Proxies / Guardianship / Conservatorship, financial planning, estate planning, will contests, family real estate, and personal property distribution.

Join trainers Arline Kardasis and Crystal Thorpe, with guest experts from the fields of elder law and gerontology, for three days packed with content, skill-building, role plays, and opportunities to interact with fellow participants (who often travel from around the world to attend).

Cost: $795 early rate by October 2nd, $895 thereafter.
Includes lunches, snacks, and course materials.
Held at The Walker Center in Newton, MA.

Presented by Elder Decisions®, a division of Agreement Resources, LLC.

For more info, visit: www.elderdecisions.com/pg19.cfm,

email training@ElderDecisions.com,

or call: 617-621-7009 x29.

Social Work Continuing Education Credits: *This program has been approved for Continuing Education Credits for relicensure in the period of October 1, 2014 - September 30, 2016, in accordance with 258 CMR, as follows: 21.25 hours for all 3 days. Boston University School of Social Work Authorization Number B-16-067.*

This training is approved under Part 146 by the New York State Unified Court System's Office of ADR Programs for 16 hours of Additional Mediation Training. Please note that final placement on any court roster is at the discretion of the local Administrative Judge and participation in a course that is either approved or pending approval does not guarantee placement on a local court roster.

Please contact us with questions regarding Continuing Legal Education credits for specific states.

32- or 40-HOUR BASIC MEDIATION TRAINING

The Mediation & Training Collaborative (TMTC)

Greenfield, MA

October 16, 17, 23 and 24, 2015 (October 30 optional)

8:30 am to 5:30 pm each day

This highly interactive, practice-based training is open to anyone who wishes to increase their skill in helping others deal with conflict, whether through formal mediation or informal third-party intervention processes in other professional settings. TMTC is a court-approved mediation program, and this training meets SJC Rule 8 and Guidelines training requirements for those who wish to become court-qualified mediators. Social work CECs and attorney CLEs (MA TAFL, VT) available upon request. Fees: $645-835. For more details or brochure, contact Debbie Lynangale, mediation@communityaction.us or 413-475-1505 - or see www.communityaction.us/upcoming-trainings-events.html.

JOIN US

MEMBERSHIP

MCFM membership is open to all practitioners and friends of family mediation. MCFM invites guest speakers to present topics of interest at four, free, professional development meetings annually.These educational meetings often satisfy certification requirements. Members are encouraged to bring guests. MCFM members also receive the Family Mediation Quarterly and are welcome to serve on any MCFM Committee. Annual membership dues are $90, or $50 for fulltime students. Please direct all membership inquiries to **Ramona Goutiere at masscouncil@mcfm.org.**

REFERRAL DIRECTORY

Every MCFM member with an active mediation practice who adheres to the Practice Standards for mediators in Massachusetts is eligible to be listed in MCFM's Referral Directory. Each listing in the Referral Directory allows a member to share detailed information explaining her/his mediation practice and philosophy with prospective clients. The most current directory is always available online at www.mcfm.org. The annual Referral Directory listing fee is $60. Please direct all referral directory inquiries to **Ramona Goutiere at masscouncil@mcfm.org.**

PRACTICE STANDARDS

MCFM was the first organization to issue Practice Standards for mediators in Massachusetts. To be listed in the MCFM Referral Directory each member must agree to uphold the MCFM Standards of Practice. MCFM's Practice Standards are available online at www.mcfm.org.

CERTIFICATION & RECERTIFICATION

MCFM was the first organization to certify family mediators in Massachusetts. Certification is reserved for mediators with significant mediation experience, advanced training and education. Extensive mediation experience may be substituted for an advanced academic degree.

MCFM's certification & recertification requirements are available online at www.mcfm.org. Every MCFM certified mediator is designated as such in the Referral Directory. Certified mediators must have malpractice insurance, and certification must be renewed every two years. Only certified mediators are eligible to receive referrals from the Massachusetts Probate & Family Court through MCFM.

Certification applications cost $150 and re-certification applications cost $50. For more information contact **S. Tracy Fischer at tracy@tracyfischermediation.com.** For certification or re-certification applications contact **Ramona Goutiere at masscouncil@mcfm.org.**

DIRECTORATE

MASSACHUSETTS COUNCIL ON FAMILY MEDIATION, INC.
P.O. Box 59, Ashland, NH 03217-0059
Local Telephone & Fax: 781-449-4430
email: masscouncil@mcfm.org

www.mcfm.org

OFFICERS

President — **Fran Whyman,** Whyman Law & Mediation, 220 North Main Street, Suite 301, Natick, MA 01760, 508-655-0700, Fran@Whymanmediation.com

Vice-President — **Laurie S. Udell,** 399 Chestnut Street, 2nd Floor Needham, MA 02492, 781-449-3355, lsudellesq@aol.com

Vice-President — **Kate Fanger,** Kate Fanger Mediation, 21 Properzi Way, Suite G, Somerville, MA 02143, 617-599-6412, KF@katefangermediation.com

Vice-President — **Barbara Kellman,** 1244 Boylston Street, Suite 200, Chestnut Hill, MA 02467, 617-278-1881, bkellman@sneiderkellman.com

Clerk — **Vicki L. Shemin,** Boston Law Collaborative, LLC, 99 Summer Street, Suite 1600, Boston, MA 02110, 617-439-4700 ext. 210

Treasurer — **Kathleen Townsend,** Divorce Mediation Group, Inc., 1441 Main Street, Springfield, MA 01103, 413-733-4444, kathleen@divmedgroup.com

Past President — **Jonathan E. Fields,** Fields & Dennis, LLP, 20 William Street, Suite 165, Wellesley, MA 02481, 781-489-6776, jfields@fieldsdennis.com

DIRECTORS — **David Burgess, Lynn C. Cooper, S. Tracy Fisher, Tanya Gurevitch, David Kellem, Justin L. Kelsey, William Leonard, Steven Nisenbaum, Mary Sheridan, Crystal Thorpe, Les Wallerstein, Marion Lee Wasserman**

EMERITI DIRECTORS — **John A. Fiske, Janet B. Weinberger, Jerome Weinstein & Barbara N. White**

ADMINISTRATOR — **Ramona Goutiere,** Goutiere Professional Business Services, P.O. Box 59, Ashland, NH 03217-0059, 781-449-4430, masscouncil@mcfm.org